IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 561 OF 2005

1. Surendra Yadav & Ors. .. Appellants

Vs.

1. The Chief Executive Officer
and ors. .. Respondents

Mr. K.P. Tiwari with Mr. Baldev H. Bhalwal for appellants.
Mr. Y.S. Jahagirdar, Sr. Counsel with Mr. G.D. Utangale i/by M/s. Utangale and Co. for Respondent No.1.
Ms. Geeta Joglekar for Respondent No.2-BMC.
Mr. Anuj Narulla i/by M/s. Jhangiani Narulla and Associates for Respondent No.3.
Ms. Geeta Mulekar, AGP for Respondent No.4.

CORAM: B.H. MARLAPALLE, J.

Date : October 05, 2005.

P.C.:

1. Admit. Respondents waive service. By consent of the parties appeal is heard finally.

2. This appeal arises from the order dated 5/4/2005 passed by the learned Judge of the City Civil Court at Mumbai dismissing Notice of Motion No.478 of 2005 moved in L.C. Suit No.451 of 2005 and the

present appellants are the original plaintiffs.

3. The respondent no.1 sanctioned plans for construction on a plot of land admeasuring 1819 sq.mtrs. on or about 7th March, 2000 for rehabilitation of slums on part of the land located in C.T.S. No.268 and Commencement Certificate came to be granted on 14th September, 2004, consequent to which the respondent no.3 has started construction sometimes in January, 2005. The plaintiffs, who are residents of 4th road Lokmanya Tilak Nagar, Goregaon (West) approached the trial court mainly for declaration that approval of plans pursuant to which respondent no.3 has started construction be declared as illegal and consequently they also sought the relief of permanent injunction. Notice of Motion was taken out for temporary injunction and the learned Judge of the trial court concluded that the plaintiffs could not make out a prima facie case for grant of temporary injunction as prayed for in the Notice of Motion. The documentary evidence placed before the trial court by the respective parties was considered and on assessment of the same the trial court was of the view

that road no.4 did not have further extension in plot no.268(Part) where the construction has been commenced and the said road ended in Northern boundary of plot CTS No.268. As per the trial court there was no prima facie evidence to show that the said road had an extension as per the sanctioned plans or the development scheme approved by the State Government. The respondent no.2 - Municipal Corporation has supported the contentions of respondent no.1 and MHADA (Maharashtra Housing and Area Development Board) was not impleaded as one of the defendants in the suit. By way of amendment the said authority has been impleaded as respondent no.4 and the subject plot belongs to MHADA. The learned counsel for MHADA states that in the absence of instructions no reply could be filed in this appeal.

4. As per the order dated 30/8/2005 the Court Commissioner came to be appointed to submit his report on the following points by visiting/inspecting plot no.268 Vijay Nagar/Tilak Nagar village Pahadi and such a report has been placed on record on or about

20/9/2005:-

i) whether there exists any extension of Road No.4 into the land forming part of CTS 268(Part) as at present and

ii) Whether the construction started by respondent no.3 is on any plot or part of it which is reserved for open space, road or garden etc. as contemplated within the ambit of the order passed by this Court on 31.7.2002 in Writ Petition No.1152 of 2002.

4A. The copy of the report has been made available to the learned counsel for the respective parties. The Commissioner could not record any findings on issue no.2 but on the first issue the Commissioner concluded, "In view of what is seen at the suit site, there exists no extension of road no.4 into the land forming part of CTS 268 (Part) as at present".

5. The learned counsel for the appellants has placed on record today copies of correspondence between respondent no.1 and its Architect M/s. Creations Architect as well as photographs purported to be of the suit plot. This correspondence has been placed today for the first time and admittedly this record was not available before the trial court. Nevertheless, this correspondence prima facie indicates that the issue of extension of road no.4 as claimed to be ending at the Northern boundary of plot CTS No.268 requires further scrutiny and Mr. Jahagirdar, the learned Senior appearing for respondent no.1 suggested for appointment of an Architect from the panel approved by this court. This suggestion may have merits but at the same time it cannot be followed in this appeal proceedings.

6. There is no dispute that plot no.268 is bounded on the West by road no.5 and on the East by road no.3. As per the respondents road no.4 ends at

the Northern boundary of plot no.268 and it does not have any extension into the plot. The learned counsel for the plaintiffs, on the basis of the documents placed on record, including those placed today, submitted that there was a concrete road joining road no.4 and going down towards the South and ending opposite Trupti Bhavan and based on the photographs he submitted that the construction has been undertaken on the open land which was in usage for road and as per his submissions such a road was shown in the development plan. He claims that the replies filed by the respondent no.1 and respondent no.2 had suppressed some material facts and respondent no.4, the owner of the plot, was not before the trial court and, therefore, the trial court could not appreciate neither existence of the suit road as an extension of road no.4 nor the provision for such a public road in the development plan. The respondent no.2 - Corporation is emphatic in saying that road no.4 ends at the border of plot no.268 and there is no road planned in the development plan which passes through plot no.268 and has an extension of road no.4. There is no dispute that the width of road nos.3 and 5 is 60

ft. or beyond whereas that the road no.4 is 30 ft. Along with the affidavit in reply filed by the respondent no.3 certified true copy of the plan sanctioned on 24/9/1998 has been annexed and it shows that there was an open space from the end of road no.4 to the Southern side right upto the drainage opposite Trupti Bhavan and almost of the same width as road no.4. The Commissioner's report states that the construction undertaken by respondent no.3 does not touch the covered drainage/Nala which is about 5 ft. 6 inches in width and by referring to this report the learned counsel for the appellants submits that the plaintiffs contentions that the subject construction is on the open space is supported in as much as more than 25 ft. in width of the open space has disappeared from North to South and bordering the garden wall. The Commissioner's report also states that in the absence of the officer from the respondent no.2 - Corporation issue no.2 could not be answered. There is no dispute from the Commissioner's report that part of the construction that has been commenced by respondent no.3 is on the open space between road no.4 and Trupti Bhavan and whether this open space was

reserved for a public road or by usage there was a road is an issue which cannot be ascertained, even for prima facie, in this appeal more so when the documents relied upon by the plaintiffs were not before the trial court. It would be, therefore, expedient that the Notice of Motion dismissed is remanded to the trial court for fresh hearing and decision by taking into consideration all the documentary evidence which has been placed before this court, including the Commissioner's report. The parties may also apply to the trial court for appointment of an Architect if found necessary. It is not possible as at present to confirm the order passed by the trial court dismissing the Notice of Motion and, therefore, there is no alternative but to remand the said Notice of Motion for fresh decision.

7. The appeal is, therefore, partly allowed and the impugned order is hereby quashed and set aside. Notice of Motion No.478 of 2005 is restored in L.C. Suit No.451 of 2005 and remanded for fresh decision after hearing the parties and by taking into

consideration the additional documents/record which the parties may place before it within a period of two weeks from today. The Notice of Motion shall be heard and decided as expeditiously as possible and in any case by 31st December, 2005. The undertaking of the learned counsel for the respective parties to co-operate with the trial court to dispose the Notice of Motion within the stipulated time is hereby recorded. The ad-interim order passed by this court on 3/5/2005 shall continue to operate till the Notice of Motion on remand is decided by the trial court. Needless to mention that the decision of the trial court will not be influenced by the ad-interim order or the observations made in this order.

(B.H. Marlapalle,J.)